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No. 98-822

IN THE
SUPREME COURT OF THE UNITED STATES

FRIENDS OF THE EARTH, et al.,

Petitioners,

V.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

BRIEF FOR 40 CALIFORNIA CITIES AND THE BAY PLANNING COALITION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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LIST OF PARTICIPATING AMICI CURIAE CITIES

Bakersfield
Barstow
Burbank
Burlingame
Camarillo
Corcoran
Cotati
Delano
El Centro
Fresno
Gustine
La Habra
Lakewood
Live Oak
Long Beach
Los Alamitos
Los Angeles
Manteca
Merced
Milpitas
Monterey
Mountain View
Novato
Palm Desert
Redlands
Roseville
San Bruno
San Diego
Santa Clara
Santa Rosa
South San Francisco
Stanton
Sunnyvale
Sutter Creek
Turlock
Vacaville
Vernon
Waterford
Towns of Corte Madera Tiburon

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BRIEF FOR 40 CALIFORNIA CITIES AND THE BAY PLANNING COALITION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTERESTS OF AMICI CURIAE

Amici Curiae Cities of Bakersfield, Barstow, Burbank Burlingame, Camarillo, Corcoran, Cotati, Delano, El Centro, Fresno, Gustine, La Habra, Lakewood, Live Oak, Long Beach, Los Alamitos, Los Angeles, Manteca, Merced, Milpitas, Monterey, Mountain View, Novato, Palm Desert, Redlands, Roseville, San Bruno, San Diego, Santa Clara, Santa Rosa, South San Francisco, Stanton, Sunnyvale, Sutter Creek, Turlock, Vacaville, Vernon, Waterford, and

the Towns of Corte Madera and Tiburon are each municipalities in the State of California. Some of these municipalities (including the Cities of Gustine, Los Angeles, Santa Rosa, and South San Francisco) have been sued in the past by citizen groups for civil penalties under the federal Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.* The remainder could potentially be the subject of such citizen suits in the future due to their operation of facilities subject to regulation under the Clean Water Act, including wastewater treatment plants and storm drain facilities.

Amicus Curiae Bay Planning Coalition is a coalition of over 150 businesses, associations, and local public agencies in the San Francisco Bay Area formed in 1983 to advocate balanced regulation and use of San Francisco Bay-Delta resources. The Coalition monitors and participates in state and federal agency policy and rulemaking on shoreline landuse and water quality issues. The Coalition is concerned about the drastic increase in Clean Water Act citizen suits filed in the San Francisco Bay Area in recent years seeking civil penalties. Some of the Coalition's members have been subjected to such citizen suits.

STATEMENT OF THE CASE

Petitioners in this case are citizen groups that have brought a citizen enforcement action against Respondent for alleged violations of a National Pollutant Discharge Elimination System ("NPDES") permit issued pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342, at a facility operated by Respondent. Pursuant to section 505 of the Clean Water Act, 33 U.S.C. § 1365, Petitioners sought injunctive relief against future violations and civil

penalties for past violations. Because Respondent brought itself into substantial compliance with the NPDES permit by the time of trial, the District Court denied the claim for injunctive relief, but did award some civil penalties. Petitioners appealed based upon the adequacy of the award of civil penalties, but did not appeal the denial of injunctive relief. Respondent cross-appealed. The Fourth Circuit held that, because the issue of injunctive relief was no longer before the court, and because civil penalties alone would not have provided any remedy to Petitioners, the claim for civil penalties had become moot. *See, Friends of the Earth v. Laidlaw Env. Services,* 149 F.3d at 305-307 (4th Cir. 1998).

SUMMARY OF ARGUMENT

The Court should find that citizen groups lack standing to seek assessments of civil penalties under the Clean Water Act. Because such penalties are payable to the United States, they do not provide any redress to a citizen and thus do not satisfy the "redressability" requirement of Article III.

The Fourth Circuit below confused the issue of whether a claim for injunctive relief has become moot with the issue of whether a citizen had standing to seek civil penalties in the first place. However, the justiciability of the two different types of relief must be analyzed separately. Having standing to seek injunctive relief against an ongoing violation does not automatically give a citizen standing to seek civil penalties for past violations. Litigating the issue of how much civil penalties should be assessed for past violations raises numerous factual issues beyond what would be required to determine whether to issue an injunction.

This Court has already held in the *Steel Co.* decision that civil penalties do not provide citizens any redress for violations which precede the filing of the complaint. The Court should also hold that civil penalties do not provide redress to citizens even if the violations are still ongoing at the time of trial. Just as in the *Linda R.S. v. Richard D.* case, the court should find that it is too speculative that the assessment of civil penalties for past violations will dissuade the defendant from future violations (and thereby arguably provide redress to a citizen injured by the violations). The mere fact that criminal and civil sanctions deter violations of law does not mean that citizens injured by such violations can find redress in the assessment of such sanctions.

Citizens can still seek full redress by pursuing claims for injunctive relief. In awarding injunctive relief, a court can include coercive sanctions if a monetary fine is necessary to enforce compliance. Civil penalties for past violations are unnecessary. Petitioners' argument that injunctive relief, without an award of civil penalties, is not sufficient to achieve compliance with the Clean Water Act is analogous to an argument this Court already rejected in *U.S. Dep't of Energy v. Ohio*. Further, civil penalties still serve as a deterrence without citizens having standing to seek them, as both the United States and state agencies still have authority to seek such penalties (even for wholly past violations).

The Court should not adopt a "case-by-case" rule which leaves open the possibility that, in some cases, an award of civil penalties might provide a particular citizen with some

redress, based on the speculative possibility that it may deter a particular defendant from future violations. Such a relaxed interpretation of Article III would be cumbersome, waste judicial resources, and often lead to absurd results. Certainly, in most cases (including this one), a court will lose jurisdiction as soon as the defendant has come into compliance (even as a result of an injunction), in which case the threat of civil penalties for past violations would clearly provide a plaintiff with no redress. Upon compliance, so long as the litigation is pending (even in the court of appeal), the civil penalty claim will then have to be dismissed as nonjusticiable, and all litigation expenses and court resources spent litigating the civil penalty issue will be wasted. Plaintiffs will want to keep alive as long as possible any issue as to whether a defendant has complied, even where (as in this case) a plaintiff would otherwise no longer litigate this issue.

Allowing citizen plaintiffs to pursue civil penalties which bear no relation to the injury they actually have suffered has led to gross abuses of the federal judicial system. Citizen plaintiffs have used the threat of penalties (sometimes totalling in the millions or even hundereds of millions of dollars) to extort contributions and other concessions out of defendants. Such abuses would not occur if the relief plaintiffs could seek were limited to remedying whatever injuries they actually suffered. Under Article III, this Court should not tolerate the use of citizen suits by environmental plaintiffs as a means of "fund-raising" for their pet projects from reluctant defendants.

ARGUMENT

I. This Court should uphold the dismissal of the claim for civil penalties, not because it became moot, but because Petitioners never had standing to seek civil penalties in the first place.

The Fourth Circuit correctly found that Petitioners' claim for civil penalties under the Clean Water Act is not justiciable, but it reached this finding for the wrong reasons. The Fourth Circuit's ruling that Petitioners' claim for civil penalties became moot incorrectly presupposes that the claim originally was justiciable. Instead, the Fourth Circuit should have ruled that Petitioners lacked standing under Article III of the United States Constitution to seek such penalties in the first place. This is because requiring Respondent to pay civil penalties to the United States Treasury for past violations of the Clean Water Act never would have redressed any injury suffered by Petitioners.

A. Citizens lack standing to seek civil penalties payable to the United States, as such penalties do not redress any injury suffered by citizens.

A primary flaw in both the Fourth District's decision and in Petitioners' opening brief is that they leap immediately to the issue of whether the claim for civil penalties had become "moot," without first addressing the key threshhold issue of whether Petitioners ever had standing to seek such penalties in the first place.

This Court should find that a citizen never has standing to seek an assessment of civil penalties under sections

309(d) and 505(a) of the Clean Water Act, 33 U.S.C. §§ 1319(d), 1365(a). This is because an award of civil penalties would not satisfy the "redressability" requirement of Article III, Section 2 of the United States Constitution. As this Court has repeatedly held, in order for a plaintiff to have standing to bring an action in federal court, the plaintiff must, *inter alia*, seek relief that will redress an injury suffered by plaintiff. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 1016-1017 (1998). Civil penalties are payable to the United States Treasury, not to the citizen plaintiff. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. 49, 53, 108 S.Ct. 376 (1987); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n. 25, 1010 S.Ct. 2615 (1981). They thus do not provide any relief to citizens, and citizens lack standing under Article III to seek them. *Steel Co.*, 118 U.S. at 1018-1019.

This Court's holding on this issue in *Steel Co.* is controlling. That case dealt with a citizen suit under the Emergency Planning and Community Right-to-Know Act of 1986 ("EPCRA"), which, like the Clean Water Act, authorizes civil penalties payable to the United States Treasury. This Court held that a citizen plaintiff does not have standing to seek such civil penalties, because they provide no redress to the citizen:

> [T]he civil penalties authorized by the statute . . . might be viewed as a sort of compensation or redress to respondent if they were payable to respondent. But they are not. These penalties--the only damages authorized by EPCRA--are payable to the United

States Treasury. In requesting them, therefore, respondent seeks not remediation of its own injury . . . but vindication of the rule of law--the "undifferentiated public interest" in faithful execution of EPCRA. This does not suffice. Justice STEVENS thinks it is enough that respondent will be gratified by seeing petitioner punished for its infractions and that the punishment will deter the risk of future harm. . . . Obviously, such a principle would make the redressability requirement vanish. By the mere bringing of his suit, *every* plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation's laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

Steel Co., 118 S.Ct. at 1018-1019 (citations omitted).

Petitioners weakly attempt to distinguish this holding by arguing that the plaintiff in *Steel Co.* did not allege an ongoing violation at the time the complaint was filed. Yet, as can be seen from the above excerpt, nothing in this Court's analysis in *Steel Co.* suggested that the issue of whether civil penalties "redress" a plaintiff's injuries depends on whether the alleged violation is ongoing at the

time the complaint is filed. Certainly, if a violation is ongoing, then a citizen plaintiff who is injured by the violations would have standing to seek injunctive relief against continued violations, as such injunctive relief would redress the injury. But merely having standing to seek injunctive relief does not give a plaintiff standing to seek civil penalties, and civil penalties do not provide a citizen plaintiff any redress against ongoing violations.

1. **A citizen group does not automatically have standing to seek civil penalties just because it has standing to seek injunctive relief; the justiciability of the two types of relief should be analyzed separately.**

Having standing to seek injunctive relief does not automatically give a citizen standing to seek civil penalties. Both the Fourth Circuit and Petitioners confuse the issue of citizen standing to seek injunctive relief with the issue of citizen standing to seek civil penalties. They fail to address the key threshhold questions of whether Petitioners had standing under *Steel Co.* to seek civil penalties in the first place, and, if so, why? In this subsection, we explain why standing to seek injunctive relief is not, by itself, sufficient to grant standing to seek civil penalties. In the subsections to follow, we will then explain why citizen plaintiffs should never be found to have standing to seek civil penalties.

We have found no case in which this Court has directly addressed the issue of whether and when having standing to seek one type of relief automatically grants a plaintiff standing to seek another type of relief as well. However, the holding in *City of Los Angeles v. Lyons*, 461 U.S. 95, 105,

103 S.Ct. 1660 (1993) suggests such automatic standing does not exist. The plaintiff in that case allegedly had been subjected to a chokehold and sued for both damages and for an injunction against the use of chokeholds in the future. This Court held that, while plaintiff had standing to seek damages for the chokehold he had suffered, plaintiff did not have standing to seek an injunction regulating the city's use of chokeholds in the future, given that it was speculative whether plaintiff would ever again be subjected to such chokeholds (and thus an injunction would provide no redress to plaintiff). 461 U.S. at 105-106. If the plaintiff in *Lyons* did not have standing to seek injunctive relief against future conduct just because he had standing to seek damages for past wrongs, then a citizen should not be found to have standing to seek civil penalties for past wrongs just because he or she has standing to seek injunctive relief against continued violations.

Most circuit courts that have addressed the issue have held that having standing to seek one type of relief never grants a plaintiff automatic standing to seek another type of relief:

> *See, e.g.*, *Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994) (analyzing justiciability separately for damages and injunctive relief); . . . *Wagshal v. Foster*, 28 F.3d 1249, 1252 (D.C. Cir. 1994) (analyzing justiciability separately for damages and injunctive relief), *cert. denied*, 115 S. Ct. 1314 (1995); *Henschen v. City of Houston*, 959 F.2d 584, 587 (5th Cir. 1992) ("Justiciability must be analyzed separately on the issues of money damages and the propriety of equitable relief."); *Williams v. Ellington*, 936 F.2d 881, 889 (6th Cir. 1991) (analyzing justiciability separately for damages and injunctive relief); . . . *National Maritime Union of Am. v. Commander, Military Sealift Command*, 824 F.2d 1228, 1234 (D.C. Cir. 1987) ("[T]he relief the litigant seeks is crucial to the determination of his standing; he may possess standing as to one form of relief [damages] but not as to another [injunctive]."); . . . *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir. 1984) (considering jurisdiction separately for damages and injunctive relief).

Nava v. City of Dublin, 121 F.3d 453, 457 (9th Cir. 1997).

Nonetheless, the Ninth Circuit applies a more liberal rule, and has found that a plaintiff who has standing to seek one type of relief automatically has standing to seek another type of relief if the claims for relief are "predicated on a single legal theory requiring development of the exact same set of facts." *Smith v. City of Fontana*, 818 F.2d 1411, 1422 (9th Cir. 1987). However, even under this more liberal rule, a citizen with standing to seek injunctive relief against ongoing violations should not be found to have standing to seek civil penalties for past violations, because the two claims do not require "development of the exact same set of facts." The Clean Water Act expressly requires courts to consider many factual issues in determining a claim for civil penalties which would not be considered in a mere claim for injunctive relief:

> In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting

> from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

33 U.S.C. § 1319(d). While a court may consider various equitable factors in issuing an injunction, *see, Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-313, 102 S.Ct. 1798 (1982), the statutory penalty factors quoted above clearly raise additional factual issues. Indeed, in many Clean Water Act cases, issues of liability and the need for an injunction are fairly readily determined, with most of the litigation effort devoted to the issue of the proper amount of civil penalties. Litigation over civil penalties can (and often does) drastically increase the scope and expense of Clean Water Act lawsuits.

Thus, citizen standing under Article III to seek an injunction against violations of the Clean Water Act in no way implies standing to seek civil penalties. The issue of whether a citizen has standing in the first place to seek civil penalties should not be confused with the issue of whether a claim for injunctive relief has become moot.

2. Civil penalties do not provide citizen plaintiffs with any redress against ongoing violations of the Clean Water Act.

This Court should find that civil penalties never provide redress to citizen plaintiffs for injuries resulting from violations of the Clean Water Act, even where violations are ongoing. It is too speculative to suppose that the award

of civil penalties for past violations (including post-complaint violations which precede the trial) will serve to discourage future violations by a defendant, sufficient to provide redress to injury which a plaintiff may suffer as a result of future violations.

As already noted, in *Steel Co.*, this Court held that an award of civil penalties payable to the United States provides no constitutional redress to a citizen, and thus that citizens do not have standing to seek such civil penalties. 118 S.Ct. at 1018-1019. Plaintiff's sole ground for distinguishing this holding is that, in *Steel Co.*, the alleged violations were not ongoing at the time suit was filed. Thus, the primary question is: ***Is there a likelihood that an award of civil penalties for past violations will redress an injury suffered by a citizen plaintiff as a result of ongoing violations, sufficient to give the plaintiff Article III standing to seek such penalties?*** Only if the answer to this question is affirmative does the Court reach the secondary question of mootness: ***Once an ongoing violation has been remedied, will the additional award of civil penalties still provide any further redress, or will civil penalty proceedings have to be dismissed at that time (even after trial but pending appeal)?*** An ongoing violation could later be rendered moot by a variety of events, including (1) compliance with injunctive relief being issued by the court, (2) voluntarily compliance by the defendant, or (3) the amendment or adoption of an NPDES permit to authorize previously prohibited discharges.

This Court has never upheld the assessment of civil penalties under the Clean Water Act or other law against a defendant in a case brought by citizens. Thus, this Court

has never had the occassion to determine whether such an award in a citizen suit is consistent with Article III. However, this Court's prior cases on standing strongly suggest that the speculative possibility that an award of civil penalties against a particular defendant will discourage future violations by that defendant is not sufficient to confer standing on a citizen plaintiff.

The case *Linda R.S. v. Richard D.*, 410 U.S. 614, 93 S.Ct. 1146 (1973) is controlling. In that case, the plaintiff sought an order compelling a state to criminally prosecute the father of her child for violating a state law requiring payment of child support. This Court held that she did not have standing, finding that it was "speculative" whether the criminal prosecution of her child's father would, in fact, result in child support payments:

> Here, appellant has made no showing that her failure to secure support payments results from the nonenforcement, as to her child's father, of Art. 602. Although the Texas statute appears to create a continuing duty, it does not follow the civil contempt model whereby the defendant "keeps the keys to the jail in his own pocket" and may be released whenever he complies with his legal obligations. On the contrary, the statute creates a completed offense with a fixed penalty as soon as a parent fails to support his child. Thus, if appellant were granted the requested relief, it would result only in the jailing of the child's father. ***The prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative.***

410 U.S. 618 (emphasis added). Just like it is speculative whether the criminal prosecution of the father in *Linda R.S. v. Richard D.* would result in the payment of child support by the father, it is also speculative whether the assessment of civil penalties for past violations of the Clean Water Act will result in future compliance by the defendant. This is true even if the Clean Water Act violations are ongoing, just like the father's alleged nonpayment of child support was ongoing in *Linda R.S. v. Richard D.*

Petitioners cite prior statements of this Court for the truism that civil penalties have a deterrent effect against future violations. *Tull v. United States*, 481 U.S. 412, 422-423 (1987); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 314 (1982). Of course, it is just as true that the threat of criminal prosecution in *Linda R.S. v. Richard D.* had a deterrent effect against violation of the statute requiring child support payments, and that all criminal and civil penalties have a deterrent effect against the unlawful activity they seek to penalize. Nonetheless, "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. at 619. The fact that criminal and civil penalties, as a general matter, deter violations of law does not mean that the prosecution of a defendant in a particular case for past violations of law will provide redress to an individual citizen cognizable under Article III, even in cases where violations of law may be repeated.

Unlike the plaintiff in *Linda R.S. v. Richard D.*, a citizen plaintiff ***can*** seek injunctive relief under the Clean Water

Act to require compliance, providing direct redress for any injury. 33 U.S.C. § 1365(a). Thus, the case against the justiciability of a claim for civil penalties under the Clean Water Act is even stronger than the case against the justiciability of the criminal prosecution sought in *Linda R.S. v. Richard D.* Not only is it speculative whether such penalties will result in future compliance, but the award of penalties for past violations often would be redundant, given that a plaintiff usually can already get full redress via a claim for injunctive relief.

Petitioners and some of their supporting *amici* express concern that an injunction alone may be insufficient, and that without the threat of monetary sanctions. defendants will not have a sufficient incentive to comply with the Clean Water Act. There are two flaws with this argument. First, Petitioners overlook the fact that, in awarding injunctive relief, courts have full authority to include coercive fines for any future violations, even though they do not have jurisdiction to award civil penalties in an action brought solely by private citizens. *See, U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 613-614, 625, 112 S.Ct. 1627 (1992) (finding that, while the United States was immune from suit for civil penalties for past violations of the Clean Water Act, it could still be subject to coercive fines to ensure compliance with an injunction). Indeed, in *U.S. Dep't of Energy v. Ohio*, this Court rejected arguments very similar to those made by Petitioners and their supporting *amici* here:

> Ohio asserts that "federal facility compliance . . . cannot be . . . accomplished without the [punitive]

> penalty deterrent." [¶] The case for such pessimism is not, however, self-evident. To be sure, an agency of the Government may break the law where it might have complied voluntarily if it had faced the prospect of punitive fines for past violations. But to say that its "compliance cannot be . . . accomplished" without such fines is to assume that without sanctions for past conduct a federal polluter can never be brought into future compliance, that an agency of the National Government would defy an injunction backed by coercive fines and even a threat of personal commitment. **The position seems also to ignore the fact that once such fines start running they can be every dollar as onerous as their punitive counterparts**; it could be a very expensive mistake to plan on ignoring the law indefinitely on the assumption that contumacy would be cheap.

503 U.S. at 625.

Second, even though citizens do not have standing to seek civil penalties, the threat of civil penalties still serves as a deterrent effect, because the United States and state agencies can still seek civil and criminal penalties, even for wholly past violations. *Gwaltney of Smithfield v. Chesapeake Bay Foundation*, 484 U.S. at 58-59. Thus, the reasoning quoted above of this Court in *U.S. Dep't of Energy v. Ohio* (in which the Court found that the United States was completely immune from any assessment of civil penalties for past misconduct) applies with even more force here (where the threat of civil penalties for past violations, in

addition to coercive fines, still exists). Indeed, if a citizen suit brings to light egregious violations of the Clean Water Act, that by itself may lead to a separate civil penalty action by the United States or a state for those past violations. Alternatively, the United States may seek to intervene into a pending citizen suit pursuant to section 505(c)(2), 33 U.S.C. § 1365(c)(2), in which case the court could issue civil penalties in that action pursuant to section 505(a), 33 U.S.C. § 1365(a).[1]

Of course, in balancing equities, courts have the discretion to deny injunctive relief even where there is an ongoing violation of the Clean Water Act. *Weinberger v. Romero-Barcelo*, 456 U.S. at 319-320. Thus, in some cases, a citizen plaintiff will be able to establish the existence of an injury which will not necessarily be remedied as a result of pursuing injunctive relief. As this Court recognized in *Weinberger v. Romero-Barcelo*, "an injunction is not the only means of ensuring compliance," and the asssessment of

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[1]Certain states have filed an amicus brief in which they have expressed concern that, if citizens do not have standing to seek civil penalties payable to the United States Treasury, then neither will states, raising the spectre that states will not be able to penalize violators of the Clean Water Act. This concern is, of course, ludicrous. In order to have a certified NPDES permit program under the Clean Water Act, states are required to enact their own laws providing for the assessment of civil and criminal penalties. 33 U.S.C. § 1342(b)(2)(B)(7); *see, United States Dep't of Energy v. Ohio*, 503 U.S. at 612, n. 1, (in which a state brought enforcement action under Clean Water Act seeking fines imposed under state law).

fines and civil penalties is an alternative means of encouraging compliance. *Id.* at 314. However, that does not change the fact that an assessment of civil penalties does not provide a citizen plaintiff with any redress cognizable under Article III. Petitioners purport to cite the above-quoted language *Weinberger v. Romero-Barcelo* as authority for the proposition that this Court has already upheld the right of citizen plaintiffs to seek civil penalties. However, that case did not uphold (or even address) any claim for civil penalties. Further, that case dealt with a citizen suit against the United States. Thus, any reading of that case as affirming the right of citizens to sue for civil penalties against the defendant in that case (the United States) would directly contradict this Court's holding in *U.S. Dep't of Energy v. Ohio*, 503 U.S. at 615-627, that the United States is immune from suit for civil penalties.

While not directly addressing the issue of whether an award of civil penalties satisfies the "redressability" requirement of Article III, this Court's decision in *Gwaltney* ***does*** effectively state that citizens do not have standing to maintain an action solely for civil penalties, even where there ***is*** an ongoing violation of the Clean Water Act at the time the complaint is filed:

> Petitioner also worries that our construction of § 505 would permit citizen-plaintiffs, ***if their allegations of ongoing noncompliance become false at some later point in the litigation*** because the defendant begins to comply with the Act, to continue nonetheless to press their suit to conclusion. According to petitioner, such a result would contravene both the

> prospective purpose of the citizen suit provisions and the "case or controversy" requirement of Article III. Longstanding principles of mootness, however, prevent the maintenance of suit when "'there is no reasonable expectation that the wrong will be repeated.'" . . . ***Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Water Act based solely on violations wholly unconnected to any present or future wrongdoing*** . . . .

484 U.S. at 66-67 (emphasis added, citations omitted). After reaching the above conclusion, this Court remanded the case to the lower court for consideration of whether any violations were ongoing. *Id.* at 67. It would be inconsistent with the above reasoning to allow a citizen-plaintiff to proceed with an action for civil penalties for violations after the they are remedied (even if the violations continued after filing of the complaint), as the above language clearly states that a Clean Water Act case should no longer be prosecuted once a defendant comes into full compliance.[2]

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[2]Petitioners make a strained interpretation of *Gwaltney* (relying on facts not disclosed in the opinion nor before this Court, but disclosed in a subsequent appellate court proceeding) to suggest that this Court recognized the ability of citizens to pursue an action solely for civil penalties. Obviously, such an interpretation directly contradicts the language quoted above. Further, while this Court in *Gwaltney* presupposed (without deciding) the ability of citizen plaintiffs to seek civil penalties in connection with a claim for injunctive relief, 484 U.S. at 58-59, it did not analyze or decide the issue of whether Article III grants citizen plaintiffs standing to seek civil penalties in connection with a claim for injunctive relief against ongoing violations.

For all of the above reasons, the Court should find that citizens never have standing to seek an assessment of civil penalties under the Clean Water Act.

3. The Court should adopt an absolute rule that civil penalties payable to the United States never provide redress to a citizen's injury, rather than allow a "case-by-case" inquiry as to whether civil penalties would redress an injury in a particular case.

As an alternative to ruling that civil penalties will ***never*** redress a citizen's injury, the Court might be tempted to adopt a "case-by-case" rule. The Court might require an evidentiary hearing in each citizen suit as to whether the possibility of an award of civil penalties for past violations would serve as a sufficient, non-speculative discouragement against future violations by that particular defendant, under the circumstances of that particular case, so as to justify allowing the citizen to seek civil penalties in addition to, or as an alternative to, injunctive relief. However, such a relaxed interpretation of Article III would be cumbersome, result in a waste of judicial resources, and would often lead to absurd results.

First, we stress that even if the Court does not rule out the possibility that a citizen group would have standing under some circumstances to seek civil penalties, such circumstances would be extremely rare and certainly do not exist in the case now before this Court. In the proceedings

below, the District Court denied injunctive relief on the ground that Respondent had been in substantial compliance with its NPDES permit for several years by the time of trial. Even if the threat of civil penalties had, in part, spurred Respondent to come into compliance (and we understand that Respondent strongly denies this), that would not change the fact that, by the time of trial, the civil penalty award for past violations provided no redress to Petitioners and thus became non-justiciable.

Likewise, in many cases, an award of injunctive relief by the Court will provide full redress to Petitioners. As soon as such an award is made, any civil penalty award for past violations (including post-complaint violations prior to trial) will not provide any additional redress. If the award of injunctive relief is made first, then the Court will have lost jurisdiction at that point to assess civil penalties. If the Court has already assessed civil penalties by the time it issues injunctive relief providing full redress, then there will be no Article III jurisdiction for any appellate proceedings concerning the amount of civil penalties, and the civil penalty award will have to be reversed at that point. All the litigation expenses and judicial resources already consumed litigating the civil penalty issue will have been wasted.

The facts of this case illustrate the absurdity of such a "case-by-case" rule. The availability of civil penalties will always depend on whether plaintiffs are still facing threatened injury requiring redress. If, as here, the court denies injunctive relief on the ground that the violation has already been remedied, or if the court awards complete

injunctive relief, the citizen plaintiffs will virtually always (if not always) have received all redress to which they are entitled, without the need for civil penalties. A "case-by-case" rule would encourage plaintiffs to appeal any order regarding injunctive relief, in the hopes that the ongoing doubt regarding whether their injuries have been redressed will keep their claim for civil penalties alive. (Indeed, it is possible that Petitioners in this case regret not appealing the denial of injunctive relief for this reason.) Likewise, defendants will be encouraged to appeal any order for civil penalties, hoping to keep the issue alive until subsequent events make it clear that the civil penalties for past violations will not redress any ongoing or threatened injury suffered by plaintiff, at which point plaintiff will no longer have an Article III interest in pursuing the civil penalty award, which will then have to be dismissed for lack of justiciability.

Finally, even if the assessment of civil penalties for ***current or ongoing*** violations were found to provide citizens with redress, the assessment of civil penalties for ***past*** violations would not. If the Court were to adopt some sort of "case-by-case" standard, it would leave to lower courts the confusing task of drawing the line between violations which were wholly in the past at the time of trial (including post-complaint violations), and those which are sufficiently ongoing such that the assessment of civil penalties would somehow discourage future violations and provide the citizen plaintiff with a remedy.

Rather than allowing judicial resources to be wasted in litigation over the appropriate amount of civil penalties

based on the speculative possibility that, in some cases, such an award will discourage future violations by a particular defendant, this Court should adhere to the clear standard it adopted in *Linda R.S. v. Richard D.*, and hold that citizens never have standing to seek civil penalties under the Clean Water Act.

B. Allowing citizen groups to seek civil penalties has led to abuses of the Federal judicial system which this Court should not permit under Article III.

It has been the experience of at least some of the *amici curiae* herein that allowing citizen plaintiffs to seek civil penalties for past violations -- the amount of which has no relation to remedying any injury actually suffered by the plaintiffs -- has led to gross abuses of the federal judicial system which should not be tolerated by this Court. Citizens often use the threat of large civil penalties to extort payments and other concessions from public and private defendants. Indeed, environmental groups often appear to use such lawsuits as a form of "fund raising," requiring defendants to agree to fund environmental projects of importance to the plaintiffs, or face not only the expense of litigation (including plaintiffs' attorneys fees if they are successful), but also the risk of more than $25,000 per day per violation in civil penalties, the sum of which can often total into the hundreds of millions of dollars.

As an example of such citizen suit abuses, one of the *amici* herein, the City of South San Francisco, as a condition of settlement of a suit challenging NPDES violations at a wastewater treatment plant, was required to

pay $90,000 to fund a state investigation of pollution from abandoned mines in the Central Valley (another target of the citizen plaintiff) well over a hundred miles away from the City's discharges. *See, United Anglers v. City of South San Francisco*, 1997 WL 362118, *2, *5-*6 (N.D.Cal., Jun 19, 1997). In this case, there was no dispute that the City had hundreds of NPDES violations, but, before the suit was even filed, the City (working with the Regional Water Quality Control Board) already had a plan in place to install over $40 million in improvements to resolve the violations.

The City took offense at being asked to pay money to a pet project of the plaintiff which would only help it file more lawsuits against other defendants. At first, the City tried to negotiate for the funds to be spent on a local project to benefit the environment where the violations occurred. When plaintiff refused to agree, the City then asked that the money instead simply be paid to the U.S. Treasury as penalties, in strict accordance with the Clean Water Act. Even though the Act only authorizes penalties to the U.S. Treasury, and no payments to plaintiff, plaintiff refused these terms. Plaintiff countered that, if the City wanted to settle based upon payment of penalties (rather than its own pet project), the settlement demand would increase from $100,000 to $300,000. Because of a large potential exposure to civil penalties, in addition to litigation costs, the City felt it had no choice but to acquiesce. In its resolution approving the settlement agreement, the City Council bitterly recited the facts leading up to the settlement agreement and stated:

> the City further opposes the use by citizen groups of citizen suits under the Clean Water Act, and the associated threat of enormous civil penalties, to leverage contributions out of cities and other defendants to fund other causes important to the citizen groups but having no relationship to the defendants' activities.

Res. No. 50-97, City Council, City of South San Francisco (copy attached as Exhibit A).

Significantly, the settlement did not include any further injunctive relief beyond the $40 million in improvements to which the City had already committed before the suit was brought. *See, United Anglers v. City of South San Francisco*, 1997 WL 362118, at *2. Thus, the case did not result in any change in the way the City was operating the plant, but merely provided opportunity for a citizen group to come in and extract its "pound of flesh" for its own purposes.

These sorts of abuses of the federal courts are a direct result of allowing citizens to file suits for relief that has nothing to do with remedying injuries actually suffered by the citizens. If the relief a citizen is seeking bears some relationship to the injury the citizen actually suffered, then the parties could fairly negotiate a settlement designed to remedy such injuries. But where a citizen plaintiff can request millions (and even hundereds of millions) of dollars in civil penalties, bearing no relationship to the harm actually suffered by the plaintiff, the plaintiff faces a great temptation to use the threat of such penalties to leverage extra concessions. This Court should not interpret Article III to allow these types of claims to be prosecuted.

CONCLUSION

For the reasons set forth herein, this Court should find that an assessment of civil penalties under the Clean Water Act payable to the United States Treasury does not remedy any injury suffered by a citizen plaintiff, and thus that citizens never have standing under Article III to seek an assessment of such penalties, even if there is an ongoing violation for which they have standing to seek injunctive relief.

Respectfully submitted.

Rick W. Jarvis
Meyers, Nave, Riback, Silver
& Wilson
Counsel for Amici Curiae 40
California Cities and the Bay
Planning Coaltion

July 1999

RESOLUTION NO. 50-97

CITY COUNCIL, CITY OF SOUTH SAN FRANCISCO, STATE OF CALIFORNIA

RESOLUTION AUTHORIZING SETTLEMENT OF ACTION BROUGHT BY UNITED ANGLERS FOR ALLEGED VIOLATIONS OF THE FEDERAL CLEAN WATER ACT AT THE CITY'S WASTEWATER TREATMENT PLANT AND APPROVING AN AMENDMENT TO THE 1996-97 OPERATING BUDGET

WHEREAS, the City is a co-owner and operator of the Water Quality Control Plant ("the Plant") at 195 Belle Air Road, which is subject to National Pollutant Discharge Elimination System Permit No. CA0038130 ("the NPDES Permit"); and

WHEREAS, at times operations at the Plant have been in violation of the NPDES Permit; and

WHEREAS, the City has been in the process of planning and implementing substantial improvements to the Plant, has completed many improvements which would avoid most NPDES Permit violations during dry weather periods, and is planning to install an estimated $41 million in upgrades by the year 2000 which should avoid NPDES Permit violations during wet weather periods; and

WHEREAS, United Anglers has nonetheless brought a citizen suit against the City pursuant to the federal Clean Water Act and has alleged over 1,000 violations of the NPDES Permit; and

WHEREAS, the City disputes that there have been over 1,000 violations of the NPDES Permit, but concedes that there have been some violations of the NPDES Permit; and

WHEREAS, the federal Clean Water Act authorizes federal courts to issue orders enjoining violations of NPDES Permits and assessing civil penalties to the federal treasury of up to $25,000 per day per violation, plus attorneys fees to prevailing plaintiffs; and

WHEREAS, courts generally do not award maximum penalties against cities for treatment plant violations, but courts have awarded penalties against cities for treatment plant violations similar to those of the City in total amounts of $400,000 or greater; and

WHEREAS, during settlement negotiations with United Anglers, the City offered to pay as penalties $100,000 to an environmental water quality remediation project to take place in South San Francisco; and

WHEREAS, United Anglers insisted, as a condition to settlement, on having the money paid to the State Water Pollution Cleanup and Abatement Account, with the intent that it be used to reimburse the Regional Water Quality Control Board for the Central Valley Regions for the monitoring of privately owned inactive and/or abandoned mines in the Central Valley with drainage to watersheds leading to San Francisco Bay; and

WHEREAS, the City opposes in principle the use of its money for remediation projects to take place in the Central Valley, in areas having no nexus to any potential water quality problem which could possibly result from the City's discharges; and

EXHIBIT A

WHEREAS, the City further opposes the use by citizen groups of citizen suits under the Clean Water Act, and the associated threat of enormous civil penalties, to leverage contributions out of cities and other defendants to fund other causes important to the citizen groups but having no relationship to the defendants' activities; and

WHEREAS, the City thus proposed that the entire $100,000 in penalties be paid directly to the federal treasury as penalties, in strict accordance with the provisions of the Clean Water Act; and

WHEREAS, United Anglers, despite the City's objections, nonetheless continued to insist that the money be used for its Central Valley project as a condition of settlement (agreeing only to allow $10,000 to be paid as actual penalties to the federal treasury); and

WHEREAS, given the great exposure to penalties, which could pose a potentially great burden on the public fisc, the City feels that it has no choice but to reluctantly agree to United Anglers' demands; and

WHEREAS, United Anglers also seeks reimbursement of fees and costs in the amount of $37,956.39, which amount the court would be likely to award; and

WHEREAS, the City has negotiated a settlement of United Anglers in accordance with the above terms, which would not require the City to make any improvements to the Plant in addition to the improvements it has already been planning to make since before this litigation was filed;

WHEREAS, the City has also negotiated terms which will drastically limit the ability of United Anglers to bring another Clean Water Act citizen suit against the City for future violations of the NPDES Permit, pending the City's completion of the planned improvements;

WHEREAS, United Anglers has already approved and executed a proposed Consent Judgment in accordance with the above terms, a copy of which is attached hereto;

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of South San Francisco, that:

1. In order to settle the Clean Water Act litigation brought by United Anglers against the City in terms consistent with those set forth in the Recitals, legal counsel for the City is hereby authorized to execute the proposed Consent Judgment in a form substantially the same as the copy which is attached hereto, and any additional related documents to accomplish that purpose.

2. The City Council further authorizes an amendment to the 1996-97 Operating Budget (BA _____) Adding $137,956.39 from the Sewer Enterprise Reserve Fund for Payment of Settlement Costs. The City Manager is authorized to make all payments called for in the Consent Judgment, if and when it is approved by the Court.

* * * * * *

BEST AVAILABLE COPY

I hereby certify that the foregoing Resolution was regularly introduced and adopted by the City Council of the City of South San Francisco at a regular meeting held on the 14th day of May 1997 by the following vote:

AYES: Councilmembers James L. Datzman, Eugene R. Mullin, John R. Penna, Robert Yee and Mayor Joseph A. Fernekes

NOES: None

ABSTAIN: None

ABSENT: None

ATTEST: /s/ Barbara A. Battaya
City Clerk

A:\SETTLMNT.RES

No. 98-822

IN THE SUPREME COURT OF THE UNITED STATES

FRIENDS OF THE EARTH, et al.,

Petitioners,

V.

LAIDLAW ENVIRONMENTAL SERVICES (TOC), INC.,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

CONSENT TO FILING OF *AMICUS CURIAE* BRIEF BY AT LEAST 40 CALIFORNIA MUNICIPALITIES AND THE BAY PLANNING COALITION

Rick W. Jarvis
MEYERS, NAVE, RIBACK,
SILVER & WILSON
777 Davis Street, Suite 300
San Leandro, CA 94577
(510) 351-4300
Counsel for Amici California Municipalities and the Bay Planning Coalition

Dated: July 6, 1999

EXHIBIT B

CONSENT FORM

The undersigned hereby consent to the filing of a joint *amicus curiae* brief on behalf of Respondent in this case by at least 40 California municipalities and the Bay Planning Coalition. The California municipalities include the Cities of Bakersfield, Barstow, Burlingame, Camarillo, Corcoran, Cotati, Delano, El Centro, Fresno, Gustine, La Habra, Lakewood, Live Oak, Long Beach, Los Alamitos, Los Angeles, Manteca, Merced, Milpitas, Monterey, Mountain View, Novato, Palm Desert, Redlands, Roseville, San Bruno, San Diego, Santa Clara, Santa Rosa, South San Francisco, Stanton, Sunnyvale, Sutter Creek, Turlock, Vacaville, Vernon, Waterford, and the Towns of Corte Madera and Tiburon.

Dated: 7/13/99

OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.

By: DACockrill

Donald A. Cockrill
Counsel for Respondent

Dated: 7/8/99

TERRIS, PRAVLIK & MILLIAN, LLP

By: Carolyn Smith Pravlik

Bruce J. Terris
Carolyn Smith Pravlik
Counsel for Petitioners